

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

220

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

No. 19735

FILED NOV 18 1965

Nathan J. Paulson
CLERK

EMERSON INSTITUTE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from The United States District Court for the
District of Columbia

Byron N. Scott
Attorney for Appellant
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

QUESTION PRESENTED

The question is whether the Internal Revenue Service should refund \$1,598.92 in FICA taxes demanded by it on the erroneous ground that appellant had lost its tax-exempt status and paid by the appellant corporation under protest.

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IN THE
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 19735

EMERSON INSTITUTE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal docketed October 21, 1965, under the provisions of Title 28, Sec. 1291 of the United States Code, from an order of the United States District Court for the District of Columbia entered September 20, 1965, granting summary judgment to the defendant, appellee herein, and denying summary judgment to the plaintiff, appellant herein.

STATEMENT OF THE CASE

A statement of material facts had been agreed to by the parties and a stipulation was filed in the Trial Court on Octo-

ber 5, 1964. The Court's attention is invited to items numbered 1, 2, 3, 6, 8, 9, 10, 12 and 13 of that stipulation, set out in full in the Joint Appendix, and summarized as follows:

1. Appellant was incorporated on May 15, 1941, under the laws of the District of Columbia.

2. On June 22, 1945, the Treasury Department held appellant to be exempt from federal income tax and exempt from employment taxes.

3. On September 28, 1946, the then subsisting trustees of appellant executed two documents entitled "Certificate of Dissolution" and "Agreement of Partnership", and caused them to be recorded. No action was instituted or prosecuted under applicable law to dissolve the corporation.

6. On August 23, 1957, appellant's tax exempt status was revoked retroactively to September 28, 1946.

8. On April 28 and July 21, 1959, IRS demanded payment of FICA taxes for the first and second quarters of 1956 in the amount of \$1,598.92, which was paid under protest.

9. On March 2, 1961, appellant filed a claim for refund.

10. On August 17, 1961, the United States District Court for the District of Columbia cancelled the Certificate of Dissolution and Partnership Agreement and ordered the Recorder of Deeds to record the cancellations, (C.A. 1566-'60), which was done.

12. Appellant has continued to operate as an educational institution since May 15, 1941.

13. Appellant's claim for refund was denied by the District Director on December 4, 1962, and affirmed by Appellate Division on October 9, 1963. An action was filed October 18, 1963.

14. On September 20, 1965, Judge Burnita Matthews in the United States District Court for the District of Columbia, granted appellee's motion for summary judgment and denied appellant's motion for summary judgment. This appeal is taken from that decision.

STATEMENT OF POINT

Appellant should not have had its tax-exempt status revoked. FICA taxes paid under protest pursuant to the illegal revocation of such status should be refunded.

SUMMARY OF ARGUMENT

The procedure by which the appellant allegedly lost its tax-exempt status was illegal, void, and of no effect. The appellant never changed its structure or operations during the period involved and continued to act consistent with its prior admitted tax-exempt status. FICA taxes paid, under protest, pursuant to the loss of such status were illegally collected and should be refunded to the appellant.

ARGUMENT

I. But for Two Documents Filed by its Trustees Appellant Would Have Retained its Tax-exempt Status.

But for the documents signed and recorded September 28, 1946, by the then two subsisting trustees of appellant, Emerson Institute, the facts stipulated in paragraphs 1, 2 and 12 of the Stipulation of Facts filed herein would entitle Emerson Institute to tax exempt status for the relevant tax year of 1956. Internal Revenue Code of 1954, 26 U.S.C.A. §3121(b)(8)(B) and 26 U.S.C.A. §§501(c)(3), 501(a), 503(a), 503(b)(2).

II. The Purported Transfer of Appellant's Assets to a Partnership was Ultra Vires.

The purported transfer of Emerson Institute's assets to a partnership was ultra vires to the corporation, illegal as in violation of express provisions of the law under which the corporation was created, against public policy, and in breach of the fiduciary duties of the trustees under the corporate charter. Consequently, the purported dissolution and agreement of partnership were void and ineffective. D. C. Code of 1929, 24.5 §§234, 235, 243 (now 29-404, 29-405 and 29-413); United States v. Mount Vernon Mortgage Corporation, 128 F. Supp. 629 (D.D.C. 1954), aff'd. 98 U.S. App. D.C. 429 (1957), 236 F.2d 724 cert. den. 352 U.S. 988 (1957). The documents evidencing such transactions have been cancelled as such by this Court.

III. A Transaction Prohibited by Statute is Illegal and Void.

A transaction expressly prohibited by the statute under which the corporation is created, or one that is malum in se or against public policy is illegal and wholly void and restitution may be had to protect the injured stockholders. Union Electric Co. of Missouri v. Boehm, 92 F. Supp. 177, 181 (E.D. Mo. 1950), app. dismissed 186 F.2d 715 (8 Cir. 1951); Sherman & Ellis v. Indiana Mutual Casualty Co., 41 F.2d 588 (7 Cir. 1930), cert. den., 282 U.S. 893 (1930); C.J.S., Corporations §966 note 49. The protection required in this case is for the public, the true beneficiary of Emerson Institute.

IV. Steps have been Taken at the Earliest Possible Moment by Appellant to Disaffirm the Void Transaction.

Pursuant to the general rule, the surviving party to the void transaction has taken steps to disaffirm it at the earliest possible moment after receiving proper understanding of his error.

Central Transportation Co. v. Pullman's Police Car Co., 139 U.S. 24, 35 L. Ed. 55; C.J.S., Corporations §966 note 50.

V. Illegal Acts of Trustee May Not Bind Appellant in Illegal Transaction.

The illegal acts of the trustees could not bind the appellant corporation, Emerson Institute, in an illegal transaction which was ultra vires to its purposes and powers. Consequently, the intent or claim under which the trustees may have operated the

school after signing and recording such void documents could not change the corporation's true tax status under the Internal Revenue Code during the relevant tax years. United States v. Mount Vernon Mortgage Corporation, cited supra paragraph 2: C.J.S., Corporations §§966, 995.

VI. Income of Appellant has been used Consistent with Tax-Exempt Status.

As in the case of District of Columbia v. Mt. Vernon Seminary, 69 U.S. App. D.C. 251, 100 F.2d 116 (1939), none of the net income of the school has gone to any individual but has been used consistent with §§29-404 and 29-405 of the D. C. Code. The intent of the two erring trustees is of no legal consequence when it appears, as stipulated by the parties, that the net income has in fact been devoted exclusively to the purposes stated in the law and the articles of incorporation.

VII. "Certificate of Dissolution" Void and Ineffective.

Since a District of Columbia corporation may be dissolved only in conformance with the provisions of the law pertaining thereto, the purported "Certificate of Dissolution" recorded by Myers in 1946 was and is de jure void and ineffective, Title 5, §§391-419, D. C. Code 1929 (now Title 29, Chapter 7, D. C. Code 1950). The corporation organized as Emerson Institute on May 15, 1941 is therefore still in existence.

VIII. Appellant Corporation Was Never Dissolved.

Since the institution for which the corporation was organized has never ceased to operate in accordance with the corporate object as authorized by the corporate charter, the corporate assets being employed thereto without liquidation or distribution and without curtailment or diminution of activity, and with trustees or trustee regularly named in the certificate of incorporation, Emerson Institute was not de facto dissolved. ABC Brewing Corp. v. Commissioner of Internal Revenue, 20 T.C. 515, aff'd. 224 F.2d 483 (9 Cir. 1955); Whitney Mfg. Co. v. Commissioner of Internal Revenue, 14 T.C. 1217, 1220-1221 (1950); Roeser & Pendleton, Inc. v. Commissioner of Internal Revenue, 15 T.C. 966, 975-976 (1950); Union Bus Terminal, Inc. v. Commissioner of Internal Revenue, 12 T.C. 197, 199-200 (1949), aff'd. sub. nom Commissioner of Internal Revenue v. Union Bus Terminal, 179 F.2d 718, 721 (9 Cir. 1951); Gensinger v. Commissioner of Internal Revenue, 208 F.2d 578, 579 (9 Cir. 1953); 16 Fletcher on Corporations (1942-1958) Sec. 7967.

The policy of the exemptions granted by the Internal Revenue Code to educational institutions should be given effect here, where nothing but a mistake of law has been erected as an obstacle to the exemption.

CONCLUSION

Since Appellant had not changed its organization or function before nor did it change after its tax-exempt status was revoked and the acts which caused IRS to revoke the status were illegal, void, and of no effect, the revocation of such status was illegal and FICA taxes paid under protest pursuant to such revocation should be refunded.

Respectfully submitted,

Byron N. Scott
Attorney for Appellant

JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 19735

EMERSON INSTITUTE, Appellant

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UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the
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IN THE
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JOINT APPENDIX

Relevant Docket Entries

Complaint	October 18, 1963
Answer	December 20, 1963
Stipulation of Facts	October 5, 1964
Exhibit M	October 5, 1964
Exhibit O	October 5, 1964
Motion of Plaintiff for Summary Judgment	March 25, 1965
Motion of Defendant for Summary Judgment	May 4, 1965
Judgment	September 20, 1965
Notice of Appeal	September 22, 1965

Filed October 18, 1963

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2575-63

EMERSON INSTITUTE, a non-profit corporation
1324-26 Eighteenth Street, N. W.,
Washington 6, D. C., Plaintiff

v.

UNITED STATES OF AMERICA, Defendant

COMPLAINT FOR RECOVERY OF F.I.C.A. TAXES

1. Jurisdiction is conferred upon this Court by Section 1346(a)(1), Title 28, United States Code, and venue is founded upon Section 1402(a), Title 28, United States Code.
2. Plaintiff is a non-profit educational corporation organized on May 15, 1941 under Chapter 8, Title 5, District of Columbia Code (1929) and existing now under Chapter 4, Title 29, District of Columbia Code. The corporation has its only office and all of its activity in the District of Columbia.
3. By a ruling dated June 22, 1945, the Treasury Department of the United States, through its Internal Revenue Service, held the plaintiff to be exempt from Federal income tax under section 101(b) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the 1954 Code. That ruling of June 22, 1945, also contained the following paragraph:

"Furthermore, under substantially identical authority contained in sections 1426 and 1607 of the Code and/or corresponding provisions of the Social Security Act, the employment taxes imposed by such statutes are not applicable to remuneration for services performed in your employ so long as you meet the conditions prescribed above for retention of an exempt status for income tax purposes."

4. On September 28, 1946, the two subsisting trustees of plaintiff, Fred P. Myers and John J. Humphrey, by means of duly recorded documents entitled Certificate of Dissolution and Agreement of Partnership, attempted to dissolve the corporation and to enter into a partnership agreement to continue the operation of the Emerson Institute as a non-profit educational institution. No action however was instituted or prosecuted under applicable law to dissolve the corporation.

5. Fred P. Myers died on October 26, 1953, leaving John J. Humphrey as sole trustee of the plaintiff.

6. In a letter dated August 23, 1957, the Tax Rulings Division of the Internal Revenue Service attempted to revoke, contrary to the provisions of §§501(a), 502, 503 and 504, Title 26, United States Code, the tax exempt status of plaintiff, retroactively, to September 28, 1946. The purported revocation was based upon the void agreements entered into by the two trustees on September 28, 1946.

7. On May 24, 1960, plaintiff filed suit in this Court (Civil Action No. 1566-60) for cancellation of the two void

agreements.

8. By a letter dated April 28, 1959, the Internal Revenue Service issued findings which purported to make the plaintiff liable for unpaid FICA taxes accrued during the first quarter of 1956. In a similar letter dated July 21, 1959, the Internal Revenue Service demanded payment of second quarter FICA taxes. Taxes and interest for the first two quarters of 1956 totalled \$1,598.92. which amount the plaintiff has paid under protest. The government's claims against plaintiff were affirmed upon appellate review by the Internal Revenue Service.

9. On February 28, 1961, plaintiff filed a timely and proper claim for refund of the \$1,598.92 with the District Director (Baltimore) of Internal Revenue.

10. On August 17, 1961, this Court signed a Decree directing the Recorder of Deeds for the District of Columbia to cancel the writing purporting to be a Certificate of Dissolution and the document purporting to be an Agreement of Partnership.

11. On September 12, 1961, plaintiff applied to the Commissioner of Internal Revenue for a reinstatement of the Commissioner's ruling of tax exemption of June 22, 1945.

12. By a letter dated August 13, 1962, the Tax Rulings Division denied reinstatement.

13. On December 4, 1962, the District Director (Baltimore) denied the claim for refund. A timely request for appellate review was granted. By a notice mailed by certified mail on October 10, 1963, the Appellate Division affirmed the disallowance of the claim for refund.

14. As a result of the erroneous holdings and illegal assessment of taxes and interest by the Internal Revenue Service, plaintiff has been forced to pay money not rightfully due the United States of America.

WHEREFORE, plaintiff demands judgment against defendant in the sum of \$1,598.92 with interest according to law, and for such further relief as the Court may deem appropriate.

Scott & Scott

by /s/ Byron N. Scott
Byron N. Scott
Attorney for Plaintiff
925 - 15th St., N. W.
Washington 5, D. C.

OF COUNSEL:

/s/ Warren S. Richardson
Warren S. Richardson
925 - 15th St., N. W.
Washington 5, D. C.

Filed December 20, 1963

ANSWER

The defendant, United States of America, by its attorney, David C. Acheson, Esquire, United States Attorney for the District of Columbia, for its answer to complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.
2. Denies the allegations contained in paragraph 2 of the complaint.
3. Denies the allegations contained in paragraph 3 of the complaint, and states that the ruling dated June 22, 1945, speaks for itself.
4. Denies the allegations contained in paragraph 4 of the complaint.
5. Denies the allegations contained in paragraph 5 of the complaint, except admits that Fred P. Myers died on October 26, 1953.
6. Denies the allegations contained in paragraph 6 of the complaint, except admits that the letter dated August 23, 1957, was issued by the Internal Revenue Service revoking the tax exempt status of plaintiff, and states that the letter speaks for itself.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. Denies the allegations contained in paragraph 8 of the complaint, except admits that the taxes were assessed and have been paid.

9. Admits the allegations contained in paragraph 9 of the complaint, except states that the date of filing of the claim for refund was March 2, 1961.

10. Denies the allegations contained in paragraph 10 of the complaint, and states that the Decree of the Court speaks for itself.

11. Admits the allegations contained in paragraph 11 of the complaint.

12. Admits the allegations contained in paragraph 12 of the complaint, but states that the letter speaks for itself.

13. Admits the allegations contained in paragraph 13 of the complaint, except states that the claim for refund was disallowed by notice of October 9, 1963.

14. Denies the allegations contained in paragraph 14 of the complaint.

WHEREFORE, the defendant prays that the complaint be dismissed with prejudice and that the defendant be permitted

its costs and disbursements.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
Assistant Attorney General
Tax Division

/s/ Myron C. Baum
MYRON C. BAUM

/s/ Jan Tyler
JAN TYLER
Attorneys,
Tax Division
Department of Justice

Of Counsel:

Attorneys for Defendant

United States Attorney

Filed October 5, 1964

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the respective parties that the following facts may be taken as true, subject to the right of either party to object to the materiality of relevancy thereof, or to introduce any further evidence not inconsistent therewith:

1. On May 15, 1941, a Certificate of Incorporation of Emerson Institute was filed in the office of the Recorder of Deeds of the District of Columbia.

2. By a ruling dated June 22, 1945, the Treasury Department of the United States, through its Internal Revenue Service, held Emerson Institute, the corporation organized as stipulated in paragraph 1 above, to be exempt from federal income tax under Section 101(b) of the Internal Revenue Code of 1939, which corresponds to Section 501(c)(3) of the 1954 Code. That ruling of June 22, 1945, also held Emerson Institute to be exempt from employment taxes.

3. On September 28, 1946, the two subsisting trustees of Emerson Institute, Fred P. Myers and John J. Humphrey, duly executed documents entitled Certificate of Dissolution and Agreement of Partnership, which purported to dissolve the corporation and to create a partnership to continue the operation of Emerson Institute as a non-profit educational institution. No action, however, was instituted or prosecuted under applicable law to dissolve the corporation.

4. Fred P. Myers died on October 26, 1953.

5. On April 15, 1954, Myra McCathran Myers entered into an agreement of sale with John J. Humphrey. On October 25, 1954, a bill of sale, an indemnity agreement and a mutual release were executed by Myra McCathran Myers and John J. Humphrey.

6. On August 23, 1957, the Tax Rulings Division of the Internal Revenue Service issued a letter of revocation of the tax exempt status of Emerson Institute, retroactively, to September 28, 1946.

7. On May 24, 1960, plaintiff filed suit in this Court (Civil Action No. 1566-60) for cancellation of the two documents referred to in paragraph 3 above.

8. By a letter dated April 28, 1959, addressed to "John J. Humphrey, trading as Emerson Institute", the Internal Revenue Service demanded payment of FICA taxes accrued during the first quarter of 1956. In a similar letter dated July 21, 1959, the Internal Revenue Service demanded payment of second quarter (1956) FICA taxes. Taxes and interest for the first two quarters of 1956 totalled \$1,598.92, which amount the plaintiff has paid. The Government's claims against the plaintiff were affirmed upon appellate review by the Internal Revenue Service.

9. On March 2, 1961, plaintiff filed a timely claim for refund of the \$1,598.92 paid as FICA taxes for the first two quarters of 1956, as demanded by the Internal Revenue Service, with the District Director of Internal Revenue Service at Baltimore.

10. On August 17, 1961, this Court signed Findings of Fact, Conclusions of Law and Decree in the case of John J. Humphrey and Emerson Institute v. Myra McCathran Myers and John B. Duncan. The Recorder of Deeds carried out the requirements of said decree.

11. On September 12, 1961, plaintiff applied to the Commissioner of Internal Revenue for a reinstatement of the Com-

missioner's ruling of tax exemption of June 22, 1945,, retro-active to that date. By a letter dated August 13, 1962, the Tax Rulings Division denied such reinstatement.

12. From May 15, 1941, when Emerson Institute was first incorporated, until the present, the following conditions have existed:

(a) As an educational institution offering courses leading to attainment of the equivalent of a high school degree, Emerson Institute has continued to maintain its basic method of operation, that is, as an educational institution, substantially unchanged and no part of its activities have constituted the carrying on of propaganda, or otherwise attempting, to influence legislation and has not participated in, or intervened in, any political campaign on behalf of any candidate for public office.

(b) No part of the net earnings of Emerson Institute was payable to any organization exempt from taxation under any of the revenue laws of the United States.

(c) All diplomas have been issued in the name of Emerson Institute and have been impressed by the same seal.

(d) All suppliers have billed the school as Emerson Institute and have been paid by Emerson Institute.

(e) All school catalogues have been issued in the name of Emerson Institute.

(f) All contracts with suppliers and with the United States Government have been in the name of Emerson Institute.

13. On December 4, 1962, the District Director of Internal Revenue Service (Baltimore) denied the claim for refund referred to in paragraph 9 above. A timely request for appellate review was granted. By a notice mailed by certified mail and dated October 9, 1963, the Appellate Division affirmed the disallowance of such claim for refund.

14. Plaintiff's predecessor in operation of the school known as Emerson Institute (but not its predecessor in interest) was Emerson Institute, Incorporated, a Delaware corporation. In 1943, the assets of this Delaware corporation were sold to satisfy the tax claims of the Federal Government and the District of Columbia.

15. The school known as Emerson Institute has at all material times offered, and at present still offers, educational facilities at the high school level and is approved by the District of Columbia Board of Education. In the evening school the students are either adults who cannot be admitted to public high schools or minors who, because of economic reasons, are not able to attend school during the hours of public high school. The day school is composed almost entirely of teenagers.

16. The following designated exhibits which are attached to this stipulation are true copies of the instruments they pur-

port to be:

- | | |
|-----------|---|
| Exhibit A | Certificate of Incorporation of Emerson Institute dated April 30, 1941. |
| Exhibit B | Ruling letter from Internal Revenue Service to Emerson Institute dated June 27, 1945. |
| Exhibit C | Certificate of Dissolution of Emerson Institute dated September 28, 1946. |
| Exhibit D | Partnership Agreement between Fred P. Myers and John J. Humphrey, dated September 28, 1946. |
| Exhibit E | Agreement of Sale dated April 15, 1954, between Estate of Fred P. Myers by Myra McCathryn Myers, executrix of the Will of Fred Myers and John J. Humphrey. |
| Exhibit F | Bill of Sale dated October 25, 1954 executed by Myra McCathryn Myers. |
| Exhibit G | Indemnity Agreement dated October 25, 1954, between John J. Humphrey and Myra McCathryn Myers. |
| Exhibit H | Mutual Release dated October 25, 1954, executed by John J. Humphrey and Myra McCathryn Myers. |
| Exhibit I | Letter dated August 23, 1957, from Internal Revenue Service addressed to Byron N. Scott. |
| Exhibit J | Complaint of John J. Humphrey and Emerson Institute filed in United States District Court for the District of Columbia against Myra McCathryn Myers and John B. Duncan on May 24, 1960. |

- Exhibit K Letter dated April 28, 1959, from Internal Revenue Service to John J. Humphrey, t/a Emerson Institute.
- Exhibit L Letter dated July 21, 1959, from Internal Revenue Service to John J. Humphrey, t/a Emerson Institute.
- Exhibit M Findings of Fact, Conclusions of Law and Decree entered August 17, 1961, by United States District Court for the District of Columbia in the case of John J. Humphrey and Emerson Institute v. Myra McCathran Myers and John B. Duncan.
- Exhibit N Letter dated September 12, 1962 from Byron N. Scott addressed to Irving Machiz, District Director of Internal Revenue.
- Exhibit O Letter dated August 13, 1962 from Internal Revenue Service addressed to Emerson Institute.
- Exhibit P Schedule of enrolled students by academic terms of Emerson Institute from Spring, 1946 to January, 1956.
- Exhibit Q Deposition of John H. Humphrey.
- Exhibit R Statement of Salaries and Wages paid by Emerson Institute to certain employees for the period from January 1, 1946 to December 31, 1956, identified in the deposition as Humphrey Exhibit No. 1.
- Exhibit S Statement of Rental paid by Emerson Institute during the period from January 1, 1946 through December 31, 1956, identified in the deposition as Humphrey Exhibit No. 2.

Attorney for Defendant

Attorney for Plaintiff

Exhibit M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. HUMPHREY
and
EMERSON INSTITUTE,

Plaintiffs

v.

MYRA MC CATHRAN MYERS
and
JOHN B. DUNCAN,

Defendants

Civil Action No. 1566-60

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECREE

This cause came on to be heard on plaintiff's Motion for Summary Judgment on a complaint to have certain writings cancelled and expunged from the public records as void and ineffective from the date of execution of such writings, and, thereupon, the plaintiffs having offered to put defendant Myra McCathran Myers in status quo with respect to such writings by consenting to be permanently enjoined from making any claim against her with respect to any matter, transaction or thing arising out of the transactions to which such writings pertain; and the defendant Myra McCathran Myers having conceded that there is no genuine issue as to any material fact; and the defendant Peter Ridley having offered no opposition to plaintiffs' Motion for Summary Judgment, the Court, having considered the verified complaint and answers, the deposition of defendant Myra McCathran Myers, the admission of plaintiffs,

the affidavit of John J. Humphrey and the documents attached thereto, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 15, 1941, a Certificate of Incorporation of Emerson Institute was filed in the office of the Recorder of Deeds of the District of Columbia, which certificate recited that it was filed pursuant to the provisions of §§231-249 inclusive, Chapter 8, Title 5 of the Code of Laws for the District of Columbia (1929).

2. John J. Humphrey and Fred P. Myers and others were named as directors of Emerson Institute, a corporation, by the aforesaid Certificate of Incorporation.

3. Prior to May 15, 1941, the school known as Emerson Institute was operated by Emerson Institute, Incorporated, a Delaware corporation; after such date the school was operated by the District of Columbia corporation, Emerson Institute. A school known as Emerson Institute has been continuously in operation in the District of Columbia since the Certificate of Incorporation of Emerson Institute, a District of Columbia corporation, was filed May 15, 1941, with the objects and purposes stated in the said Certificate of Incorporation.

4. Prior to May 29, 1943, John J. Humphrey and Fred P. Myers had obtained judgments for unpaid salaries, and the United States and District of Columbia governments had assessed taxes, both of which claims became liens against the assets of Emerson Institute, Incorporated, the Delaware corporation, such assets then being in the possession of Emerson Institute, the District of Columbia corporation.

5. On or before May 29, 1943, the Governments aforesaid sought to enforce their liens for taxes against the assets of the Delaware corporation. Certain of the directors of the District of Columbia corporation (who were also directors of the Delaware corporation), then persuaded Humphrey and Myers to waive their judgments, the purpose being to allow the Governments to satisfy their claims out of the proceeds of a sale of the Delaware corporation's furniture and school equipment. This Humphrey and Myers agreed to do with the understanding that they would be allowed to keep the school open. Upon such understanding, the other directors resigned. The Delaware corporation's furniture and school equipment were thereupon sold to satisfy the Government's claims.

6. John J. Humphrey never resigned, or failed re-election, nor was he otherwise removed, as a director of Emerson Institute, the District of Columbia corporation; and he has been continuously

employed by the school known as Emerson Institute except during a period of service in the Army in 1944 to 1946, since being appointed a director in the aforesaid Certificate of Incorporation.

7. On October 1, 1946, Fred P. Myers filed in the office of the Recorder of Deeds of the District of Columbia, in Incorporation Liber No. 64, Folio 457, an instrument signed on September 28, 1946, by himself and John J. Humphrey, purporting to be a Certificate of Dissolution of the corporate plaintiff.

8. On February 12, 1947, Fred P. Myers filed in the office of the Recorder of Deeds of the District of Columbia an instrument signed on September 28, 1946 by himself and John J. Humphrey, recorded as Instrument No. 6840 in Liber No. 8243, Folio 431, purporting to be an Agreement of Partnership between them for the operation of the said school, the Emerson Institute, pursuant to which the purported partners would share the profits and losses equally.

9. The individual plaintiff, John J. Humphrey, entered the military service of the United States in February, 1944, and did not return until January, 1946. During his absence he participated to a very limited degree in the operation of the school by correspondence. Between the date of his return and

September 28, 1946, there arose differences between the individual plaintiff and Fred P. Myers as to the operation of the school. The individual plaintiff pressed Fred P. Myers for an agreement recognizing his authority in school matters. Ultimately, Fred P. Myers, who was a lawyer, produced the two instruments referred to in ¶¶ 7 and 8 and suggested to the individual plaintiff that the execution of the said two instruments would be the best solution of their differences. The individual plaintiff is not a lawyer; he signed the purported Certificate of Dissolution and the purported Agreement of Partnership, with the understanding that the school and its affairs would be conducted as before as a non-profit educational institution.

10. Following the signature and recordation of the two instruments, the affairs of the school were conducted as before; no liquidation of the corporate assets and no distribution of corporate surplus was ever made to the purported partners under the said purported Agreement of Partnership; and while the said school was sometimes referred to in various instruments as a partnership, it was in fact operated as a non-profit educational corporation; and all receipts from the operation of the said school have ever been devoted solely to the operation of the said school.

11. Fred P. Myers died October 26, 1953, and was survived by his widow, Myra McCathran Myers, his only heir.

12. The individual plaintiff, after the death of the said Fred P. Myers, consulted counsel, and, being advised thereto on October 28, 1953, executed a Declaration of Trust as a sole trustee for the Emerson Institute. After October 28, 1953, until shortly before this action was commenced, the individual plaintiff conducted the affairs of the school as sole trustee on a non-profit basis in accordance with the said Declaration of Trust. Shortly before this action was commenced, however, Humphrey was advised by counsel that the dissolution of the District of Columbia corporation was ineffective in law; that the May 15, 1941 corporation was still in existence and that it was his duty to restore corporate administration. Humphrey thereupon sought other persons to act as directors and began this action.

13. The estate of the said Fred P. Myers, under his Last Will and Testament, has been duly administered and distributed. The Executrix of said estate, Myra McCathran Myers, has been discharged; and none of the assets of the corporate plaintiff was claimed or distributed as part of the estate of the said Fred P. Myers in the settlement and distribution thereof.

14. The individual plaintiff and his wife, Catherine Hinsley Humphrey, have from time to time been entitled to nominal salaries from the corporate plaintiff for their services to the school. The payment of such salaries has been normally, and is now, in arrears.

15. No resolution of dissolution has ever been adopted by the corporate plaintiff in accordance with the provisions of its Certificate of Incorporation or By-Laws; no application for dissolution has ever been filed by or on behalf of the corporate plaintiff in the United States District Court for the District of Columbia. No decree of dissolution has ever been issued by said District Court.

16. Due to the appearance of the said two instruments as a public record, the Federal Internal Revenue Service has revoked a previously existing Treasury Department ruling that the corporate plaintiff is exempt from certain federal taxes as a non-profit, educational institution. Despite the diligence of both plaintiffs in attempting to persuade the tax authorities that corporate plaintiff still exists as a tax-exempt, educational institution, the Internal Revenue Service has assessed taxes against the individual plaintiff in respect to the operation of the school. The said two instruments have been and will

continue to be a source of confusion so far as the credit of both the individual and corporate plaintiffs are concerned.

17. The corporate plaintiff does not have sufficient funds with which to pay the taxes assessed against it as aforesaid. The taxes assessed are employment taxes, the liability for which cannot be reviewed judicially except after payment. If the said two instruments are cancelled by this Court, corporate plaintiff will be able to apply for a reinstatement of the said Treasury Department ruling concerning its tax-exempt status. Unless corporate plaintiff is able to re-establish its status as a tax-exempt non-profit, educational institution, its funds will be levied upon by the Treasury Department, by virtue of which levy the corporate plaintiff will not be able to maintain the said school.

18. The defendant, Peter Ridley, is the Recorder of Deeds of the District of Columbia.

19. On April 15, 1954, the individual plaintiff and the defendant Myra McCathran Myers, as executrix of the estate of Fred P. Myers, in the belief that there existed a partnership between Fred P. Myers and the individual plaintiff executed an Agreement of Sale by the estate of the decedent's interest in said partnership to the individual plaintiff, and in connection

with said transaction there was also executed a Mutual Release and Indemnity Agreement and a Bill of Sale, all of these latter documents under date of October 25, 1954. The validity of these documents is not questioned, and they are found by the Court to be in full force and effect.

CONCLUSIONS OF LAW

1. That all the proper parties to this action were before the Court.
2. That under the provisions of Chapter 7, Title 29 of the District of Columbia Code, the writing dated September 28, 1946 purporting to be a Certificate of Dissolution of the plaintiff Emerson Institute, a District of Columbia corporation, recorded on October 1, 1946 in Incorporation Liber No. 64, Folio 457 at the Office of the Recorder of Deeds for the District of Columbia, was and is ineffective to dissolve the said corporation and constitutes a cloud on the corporate status of the corporate plaintiff.
3. That the purported conveyance of the corporate assets of Emerson Institute, dated May 29, 1943, to a purported partnership of the same name was executed in good faith but on its face constituted a breach of the fiduciary duties of the directors of the corporation and must be set aside.

4. That the purported Agreement of Partnership, dated September 28, 1946, between John J. Humphrey and Fred P. Myers, recorded February 12, 1947 as Instrument No. 6840 in Liber 8423, Folio 431 at the office of the Recorder of Deeds for the District of Columbia, was entered into in good faith but on its face purported to divert corporate assets for an unauthorized purpose and as a public record constitutes a cloud on the corporate status of the corporate plaintiff and tends to compromise the credit standing of both the corporate and individual plaintiff.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED, that

1. The writing dated September 28, 1946 purporting to be a Certificate of Dissolution of Emerson Institute, is hereby cancelled; and the defendant Peter Ridley is hereby directed to record such cancellation by appropriate inscription on the copy of such writing, recorded October 1, 1946 in the Office of the Recorder of Deeds for the District of Columbia, in Incorporation Liber No. 64, Folio 457.

2. The writing dated September 28, 1946 purporting to be an Agreement of Partnership between John J. Humphrey and Fred P. Myers, is hereby cancelled; and the defendant Peter Ridley is hereby directed to record such cancellation by appropriate inscription on the copy of such writing, recorded February 12,

1947 in the Office of the Recorder of Deeds for the District of Columbia, as Instrument No. 6840 in Liber No. 8423, Folio 431.

3. Plaintiffs John J. Humphrey and his heirs, administrators, successors, assigns and privies; and Emerson Institute, its successors, assigns, trustees and privies, are hereby jointly and severally permanently enjoined from ever making any claim against Myra McCathran Myers, whether personally or as executrix of Fred P. Myers, with respect to any matter, transaction or thing to which the said writings pertain.

4. The validity of the transaction referred to in ¶19 of the foregoing Findings of Fact or of the documents referred to therein cannot now be questioned.

s/ Hart 8/17/61
JUDGE

CONSENT:

Swingle & Swingle
Attorneys for Defendant Myers

By: s/
William T. Clague

Corporation Counsel
Attorneys for Defendant Duncan

By: s/
M. Michael Cramer
Assistant Corporation Counsel

Scott & Scott
Attorneys for Plaintiffs

By: s/
Byron N. Scott

Exhibit O

U. S. TREASURY DEPARTMENT
Internal Revenue Service
Washington 25, D.C.

In reply refer to
T:R:EO:3
WSL

Aug. 13 1962

Emerson Institute
1324-26 18th Street, N.W.
Washington 6, D. C.

Gentlemen:

This is in reference to a letter received from Mr. J. Humphrey with which he presented certain additional information concerning your operations. Mr. Humphrey indicates on the basis of this information that you desire to apply for a reinstatement of our ruling dated June 22, 1945, wherein we held that a corporation known as Emerson Institute was exempt from Federal income tax under section 101(6) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the Code of 1954.

We regret the delay in this matter. The above ruling was effective for the period from the date in 1941 on which Emerson Institute was incorporated under the laws of the District of Columbia until September 28, 1946. On that date Fred P. Myers and John J. Humphrey executed a certificate of dissolution of the corporation. On the same date and by a separate instrument they entered into a partnership agreement. Both of these documents were subsequently filed for recordation with the office of the Recorder of Deeds for the District of Columbia. On and after September 28, 1946, the said Fred P. Myers and the said John J. Humphrey operated the Emerson Institute as a partnership until the death of Mr. Myers in 1953. Sometime after the death of Mr. Myers, Mr. Humphrey and Mr. Myers' widow acting as executrix of his estate, executed an agreement of sale by the estate to Humphrey of the decedent's interest in the partnership, and John J. Humphrey alone continued to operate the Emerson Institute. The foregoing information came to the attention of the Internal Revenue Service and thereafter under date of August 23, 1957, the Service informed your attorney, Mr. Byron N. Scott of Washington, D. C., that the exempt status of the corporation was terminated as of September 28, 1946.

Emerson Institute

On May 24, 1960, Mr. Humphrey and you petitioned the United States District Court for the District of Columbia for the cancellation of the articles of dissolution and partnership agreement referred to above. In this connection, Mr. Humphrey furnished a conformed copy of the Findings of fact, Conclusions of Law and Decree signed by a judge of that court on August 17, 1961. Provision was made in the Decree for the cancellation of these documents.

The information now furnished by you discloses that during the period from September 28, 1946, until October 26, 1953, the school known as Emerson Institute was operated under a partnership agreement entered into in good faith but cancelled by the decree of the United States District Court dated August 17, 1961. Further, it is recited in the decree that after the death of Fred P. Myers, John J. Humphrey upon advice of counsel executed a declaration of trust and, as a sole trustee, operated the school after October 28, 1953, until shortly before the court action was begun. It is also stated in the decree that prior to beginning action in court, Mr. Humphrey sought other persons to act as directors of the corporation. [Notwithstanding the decree of the court, however, it is apparent that, in fact, in the period from September 28, 1946, until the commencement of the proceeding in the United States District Court you did not operate or claim to be operating the school as a corporation.] Accordingly, our ruling of August 23, 1957, remains in effect.

However, there is a possibility that you may qualify for exemption from Federal income tax as an organization described in section 501(c)(3) of the Code, beginning August 17, 1961, and for later years. In order to be exempt under this section of law, an organization must be both organized and operated exclusively for one or more of the exempt purposes specified in the section. If an organization fails to meet either the organizational or operational tests, it is not exempt. In this connection, see Announcement 62-19, I.R.B. 1962-8, 20 and paragraph (c) of section 1.501(c)(3)-1 of the Income Tax Regulations, published as Treasury Decision 6391, Cumulative Bulletin 1959-2, 139. Since we regard the changes needed in your form of organization and method of operation as substantive in nature, any further ruling with respect to your status would not be based on past

Emerson Institute

operations, but on the above changes, as well as your purposes as stated in the articles of incorporation and actual activities as evidenced by the method of operation over a period of time and to an extent sufficient to clearly disclose that you are operated exclusively for one or more of the exempt purposes specified in section 501(c)(3).

If you will submit a new application for exemption after you have actively operated for a period of twelve months from August 17, 1961, we will give further consideration to your status for Federal income tax purposes. You should submit at that time to the District Director at Baltimore the following documents in duplicate; a completed exemption application on Form 1023; conformed copies of the articles of incorporation including any amendments to that document; conformed copies of the bylaws including any amendments; a classified statement of your gross receipts and disbursements during the above period; a complete statement of your assets and liabilities as of the end of that period; the most recent catalogue of your school; and another conformed copy of Civil Action No. 15 66-60 as decided by the United States District Court for the District of Columbia on August 17, 1961. There is enclosed a copy of this letter which should be attached to any application you file. Copies of the application form and any necessary instructions may be obtained from the District Director at Baltimore, who is being informed of this action.

Very truly yours,

/s/ E. G. Parker

Acting Director, Tax Rulings Division

Enclosure:

Copy of this letter

Filed March 25, 1965

Motion of Plaintiff for Summary Judgment

Plaintiff, Emerson Institute, by its attorney, Byron N. Scott, moves the Court as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, as more fully appears in the Points and Authorities attached hereto and made a part hereof.

/s/ Byron N. Scott
Byron N. Scott
Attorney for Plaintiff

Filed May 4, 1965

Motion of Defendant for Summary Judgment

The defendant, United States of America, by its attorney, David C. Acheson, Esquire, United States Attorney for the District of Columbia, moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that the Court enter summary judgment for the defendant on the ground that there is no dispute as to

any material fact and that the defendant is entitled to judgment as a matter of law.

This motion is supported by a stipulation of facts filed by the parties and the defendant's memorandum of points and authorities in support of its motion for summary judgment and in opposition to plaintiff's motion for summary judgment, filed herewith.

/s/ John B. Jones, Jr.

JOHN B. JONES, JR.
Acting Assistant Attorney
General

/s/ Myron C. Baum

MYRON C. BAUM

/s/ Jan Tyler

JAN TYLER
Attorneys, Tax Division
Department of Justice

Of Counsel:

Attorneys for Defendant

/s/ David C. Acheson

United States Attorney

J U D G M E N T

This action came on to be heard before the Court on the Motions for Summary Judgment filed on behalf of each of the respective parties hereto, and the issues having been considered

upon the basis of the briefs and oral arguments of counsel on July 30, 1965; it is hereby

ORDERED that plaintiff's Motion for Summary Judgment be denied and defendant's Motion for Summary Judgment be granted, and it is further

ORDERED and ADJUDGED that this action is hereby dismissed with prejudice.

Signed this 20th day of September, 1965.

United States District Judge.

NOTICE OF APPEAL

Notice is hereby given this 22nd day of September, 1965, that EMERSON INSTITUTE, Plaintiff, in the above entitled action hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of September, 1965 in favor of defendant against said plaintiff.

/s/ Byron N. Scott
Attorney for Plaintiff
1010 Vermont Avenue, N. W.
Washington, D. C.
Sterling 3-1025

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 19,735

EMERSON INSTITUTE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court
for the District of Columbia
United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 23 1966

Nathan J. Paulson
CLERK

PETITION OF
APPELLANT FOR REHEARING

Appellant respectfully petitions this Court in accordance with Rule 26 of its General Rules, for a rehearing of the decision entered in the above captioned case on February 8, 1966.

STATEMENT OF FACTS

The District Court considered the case on an agreed statement of facts which was printed in the Joint Appendix to appellant's brief at pages 8-14. The facts were summarized in appellant's brief on pages 1-3 and in appellee's brief on pages 1-3. For the conven-

ience of the Court in considering this Petition, the facts relevant to the decision are again set forth.

1. Appellant was incorporated on May 15, 1941, under the laws of the District of Columbia as a non-profit educational corporation. John J. Humphrey and Fred P. Myers were two of the incorporators. (J. A. 8 and Exhibit A attached to the Stipulation)

2. From May 15, 1941, until the present appellant has been run as an educational institution. It has continued to maintain its basic method of operation. It has never ceased to operate under the name of Emerson Institute. (J. A. 11)

3. By a letter dated June 22, 1945, the Deputy Commissioner informed appellant that it was the "opinion" of his office that appellant was exempt from income tax and employment taxes. (J. A. 9 and Exhibit B)

4. In 1946, the two then subsisting trustees of appellant, Humphrey and Myers, executed two documents entitled "Certificate of Dissolution" and "Agreement of Partnership", which purported to dissolve the corporation and to create a partnership between Humphrey and Myers to continue the operation of appellant corporation as a non-profit educational institution. These documents were duly recorded. No action, however, was instituted or prosecuted under applicable law to dissolve the corporation. (J. A. 9 and Exhibits C and D)

5. Incorporator-trustee Myers died on October 26, 1953.

(J. A. 9)

6. On October 28, 1953, Humphrey executed a "Declaration of Trust" as a sole trustee for appellant and conducted the affairs of appellant as sole trustee on a non-profit basis in accordance with the Declaration. (J. A. 20)

7. On April 15, 1954, Mrs. Myers, as Mr. Myers' Executrix, entered into an agreement of sale of Mr. Myers' interest in the school with Mr. Humphrey and on October 25, 1954, a bill of sale to Mr. Humphrey was executed by Mrs. Myers. (J. A. 9 and Exhibits E and F)

8. By a letter dated August 23, 1957, the Tax Ruling Division of the Internal Revenue Service revoked its June 22, 1945 "Opinion" and made the revocation retroactive to September 28, 1946. (J. A. 9 and Exhibit I)

9. On April 28 and July 21, 1959, the Internal Revenue Service demanded payment of FICA taxes accrued during the first and second quarters of 1956, which were paid by appellant. (J. A. 10 and Exhibits K and L)

10. By a decree signed August 17, 1961, the United States District Court for the District of Columbia concluded that the "Certificate of Dissolution" was "ineffective to dissolve" appellant

(J. A. 23) and the "Partnership Agreement . . . on its face purported to divert corporate assets for an unauthorized purpose" and ordered that the two documents be cancelled. (J. A. 24)

BASIS FOR PETITION FOR REHEARING

1. To the extent that the decision of the Court is based upon an alleged power of the Internal Revenue Service to "grant" and "revoke" tax exempt status to appellant, the decision is wrong.

a. The following statement on page two of the Opinion would indicate that the decision is based, in part at least, upon an alleged power to "grant": "In 1945, the appellant, as a non-profit educational corporation, had been granted an exemption from federal taxes by the Internal Revenue Service." (underlining supplied for emphasis) It is the law, not the Internal Revenue Service, which exempts "corporations . . . organized and operated exclusively for . . . educational purposes . . ." Int. Rev. Code of 1954, Sec. 501 (c) (3); Trinidad v. Sagrada, (1923) 263 U.S. 578. There has been no change in this part of the Code since original enactment in 1913. The appellant is, was in 1946 and 1956, and since 1941 has been a de jure corporation organized and operated exclusively for educational purposes. No part of the net earnings have ever inured to the benefit of any private shareholder or individual. The

Internal Revenue Service can only issue opinions as to whether such a corporation qualifies under the exemption provision of the law. The Internal Revenue Service did not even purport to "grant" exempt status to appellant in 1955; it stated that in the "Opinion" of the office the facts about appellant qualified it for tax exempt status under the law. The Code, Section 501 (a) says that "An organization described in Subsection (c) or (d) or Section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under Sections 502, 503, or 504". (underlining supplied) Section 501 (c) (3) lists among others "corporations organized and operated exclusively for educational purposes" The language is mandatory and there is no discretionary power over this provision lodged in the Internal Revenue Service.

b. The following statement on page two of the Opinion would indicate that the decision is based in part, at least, upon an alleged power to "revoke": "When the Internal Revenue Service learned belatedly of the 'dissolution' of the appellant as a corporation, it revoked the tax exemption because a partnership is not eligible for tax exemption under the provisions of Section 501 of the Internal Revenue Code of 1954." (underlining supplied for emphasis) The Internal Revenue Service has and has had no power under the statute to "revoke" the exemption granted to appellant by the law. Sections 501 (a) and 501

(c) (3) exempt appellant as long as it continues to be an organization described in Section 501 (c) (3). Sections 503 (b) (2) and 504 (a) read together deny to the Internal Revenue Service the power to deny the exemption granted by Section 501 (a). Section 504 (a) says that "In the case of any organization described in Section 501 (c) (3) [appellant] to which section 503 is applicable, exemption under section 501 shall be denied for the taxable year if the amounts"

The rest of this section does not apply to appellant since none of the three listed reasons for denial has ever been said to exist in reference to appellant. Section 503 is not applicable to appellant.

Section 503 (b) says:

This section shall apply to the organizations described in section 501 (c) (3) or (17) or section 401 (a) except . . . (2) an educational organization which normally maintains a faculty or curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on."

It has not been questioned but that appellant maintains a faculty and curriculum and always has a regularly enrolled body of pupils or students in attendance at the place where its educational activities have been regularly carried on since 1941. The Internal Revenue Service was not only without power to "revoke" appellant's statute given exemption, it did not profess to do so. All the Service said in its August 23, 1957 letter was that "the dissolution"

automatically terminated the previous ruling" as to exemption.

2. To the extent that the decision of the Court is based upon the "Agreement of Sale", dated April 15, 1954, and the "Bill of Sale", dated October 25, 1954, between Mrs. Myers and Mr. Humphrey, the decision is wrong.

The Opinion says "Following the death of the 'partner' in 1953, the surviving 'partner' purchased the deceased 'partner's' interest from his estate." The Opinion also says that the judgment in 1961 "allowed the sale of the deceased 'partner's' share of the business to remain undisturbed." Simply stated, the facts are, regardless of any recitations in the documents, that when "partner" Myers died in 1953, "partner" Humphrey "purchased" anything connected with the school which Mr. Myers had owned and Mrs. Myers could sell and deliver. This was the transaction of which the Court said in 1961 the validity cannot now be questioned. Mrs. Myers could not sell anything that Mr. Myers and Mr. Humphrey had held as trustees of the school. The estate of Mr. Myers under his Last Will and Testament was duly administered and distributed. None of the assets of the corporate appellant was claimed or distributed as part of the estate of Mr. Myers in the settlement and distribution. (J. A. 20) Since Mrs. Myers received none of the assets of the school and neither Mr. Myers nor his wife, as Executrix, could transfer title to any of the assets of the school,

Mr. Humphrey, the "surviving partner" purchased nothing from her which had belonged to the two men as trustees of the school. Even so, prior to signing these two documents, Mr. Humphrey had executed his Declaration of Trust declaring that he was holding everything in trust for the school which he and Mr. Myers had held as trustees of the school.

3. To the extent that the decision is based upon the denial of any claim for relief appellant was making based upon the 1961 decree, the decision is wrong.

No reliance was placed upon the legal effect of the 1961 consent judgment by appellant. This was stated clearly by counsel for appellant during oral argument in response to a direct question by Judge Tamm.

It was not the 1961 decree of the District Court that establishes appellant as a tax exempt corporation for the period in dispute. It became a de jure corporation when its articles were approved as filed and did not cease at any time to be such because it never took any of the steps required by the law for dissolution. The parties had agreed that Myers and Humphrey and later Humphrey had continued to run the school as it had always been run. (J. A. 9, 19) The existence of a de jure corporation eliminates any question about the existence of a de facto corporation. The 1961 decree of the Court did not profess to

cancel the "purported legal effect" of the two documents, it simply ordered that they and the registration of them be cancelled because they had never had any legal effect.

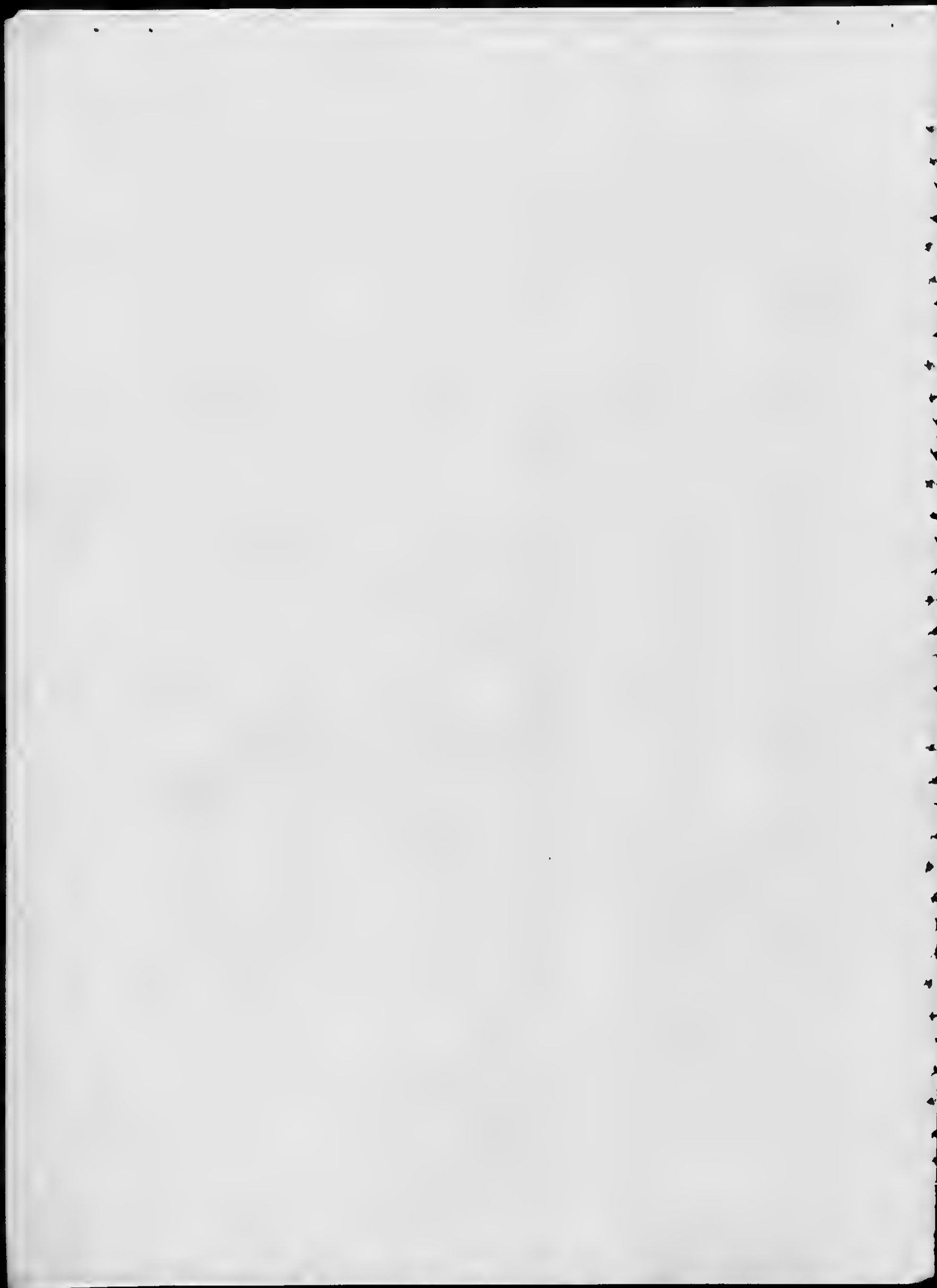
4. To the extent that the decision is based upon a disclaimer of Myers and Humphrey in 1946 of a legal status that entitled appellant to exemption, the decision is wrong.

The taxable year in question is 1956. The two recorded documents were executed in 1946. It is upon these two documents that the statement is made in the Opinion that the 1961 decree "did not, as it could not, deprive the Internal Revenue Service of its right and duty to assess and collect taxes for a period when the taxpayer had disclaimed the only legal status under which it was entitled to an exemption." The execution of these documents by the two trustees was ultra vires and not binding on appellant, the taxpayer. But Myers - one of the authors of the disclaimer - had died in 1953. Immediately after his death, the "surviving partner", Humphrey, declared in writing that he would "continue to act as trustee" that "all legal title to the trust property, including the trust property held jointly in the names of Fred P. Myers, now deceased, and myself, will continue to be in my name as trustee, or jointly in my name and in the names of other trustees appointed" and that "the trust property includes the name, seal, records, and good will of Emerson Institute, employment contracts

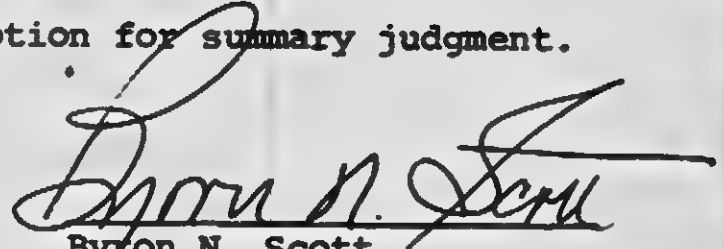
with teachers and other employees, and all furniture, fixtures, equipment, supplies, books and other tangible property, necessary to the operation of a school." (J. A. 20)

This Declaration of Trust was dated October 28, 1953. The seal of Emerson Institute was impressed on the paper. This was seven years after the recordation of the two instruments; approximately one year before the Bill of Sale from Mrs. Myers to Humphrey and over two years prior to the two taxable quarters of 1956 involved in this suit. If an invalid act of disclaimer can be a fact upon which a decision can be based, then a valid act of disclaimer of the disclaimer should receive at least equal comparable distinction and consideration. The two trustees of the non-profit corporation created under the laws of the District of Columbia had no more power to alter or dissolve the charter of that corporation than the State of New Hampshire did to impair the obligation of Dartmouth College's Charter. Trustees of Dartmouth College v. Woodward, 4 Wheaton 518.

For the foregoing reasons it is respectfully submitted that the judgment of the Court issued February 8, 1966, should be recalled, the action of the District Court should be reversed and an order entered




directing that Court to grant plaintiff's motion for summary judgment.


Byron N. Scott
Attorney for Appellant

Certificate of Counsel

I, Byron N. Scott, counsel for appellant in the above captioned case, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.


Byron N. Scott

BRIEF FOR THE APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 19,735

EMERSON INSTITUTE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal From the Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED DEC 1 1965

Nathan J. Paulson
CLERK

RICHARD M. ROBERTS,

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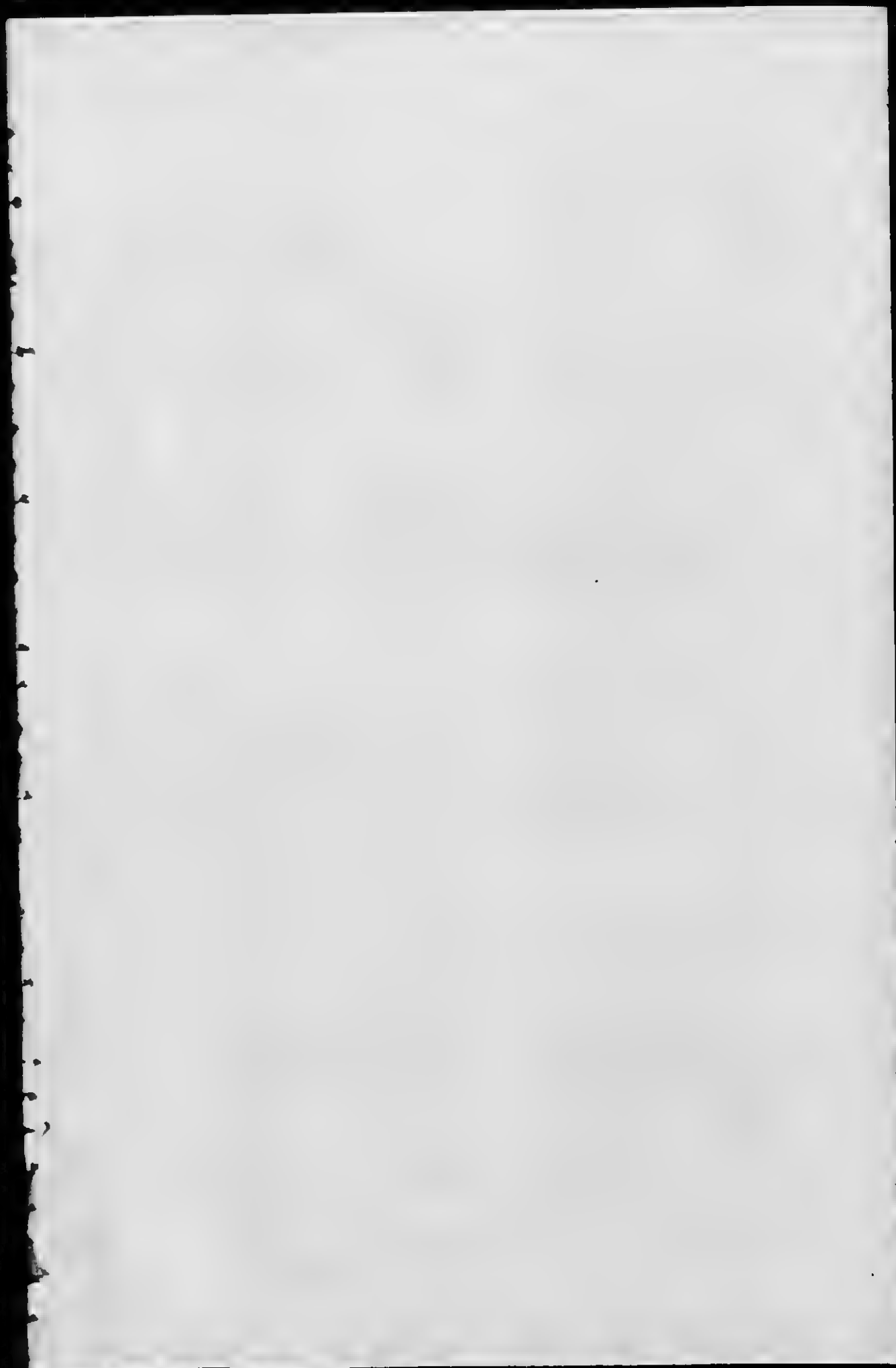
Of Counsel:

DAVID G. BRESS,

United States Attorney.

FRANK Q. NEBEKER,

Assistant United States Attorney.



STATEMENT OF QUESTION PRESENTED

In this case the two surviving trustees of a corporation, which in 1945 had obtained from the Internal Revenue Service a ruling of exemption, filed with the Recorder of Deeds in 1946 and 1947, respectively, a Certificate of Dissolution of the corporation and an Agreement of Partnership between themselves. After one of the partners died in 1953 the remaining partner bought out his interest from his estate. Upon discovery of the dissolution of the corporation the Internal Revenue Service revoked the exemption because a partnership is not eligible for exemption, and in 1959 asserted a deficiency in FICA taxes for the first and second quarters of 1956 against "John J. Humphrey, trading as Emerson Institute". In 1961, approximately fourteen years after the Certificate of Dissolution and the Agreement of Partnership had been recorded, the surviving partner, in a proceeding to which the Internal Revenue Service was not a party, obtained a decree from the District Court canceling the Certificate of Dissolution and the Agreement of Partnership but sustaining the validity of the sale of the deceased partner's interest to the surviving partner.

In the opinion of the appellee the question is:

Whether under the circumstances of this case FICA taxes for the first two quarters of 1956 were properly asserted against "John J. Humphrey, trading as Emerson Institute".



III

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 19,735

EMERSON INSTITUTE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal From the Judgment of the United States
District Court for the District of Columbia

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE CASE

The Government accepts the taxpayer's statement with certain additions, or modifications.

The Certificate of Dissolution was recorded in the office of the Recorder of Deeds on October 1, 1946, and the Agreement of Partnership between Fred P. Myers and John J. Humphrey was recorded on February 12, 1947. (JA 13, 18.)

One of the partners, Fred P. Myers, died on October 26, 1953 (JA 9) and on April 15, 1954, Humphrey and Myra McCathran Myers, as executrix of the estate of Fred P. Myers executed an agreement of sale by the estate of the decedent's interest in the partnership to Humphrey (JA 22). The sale price was \$15,000. (Ex. E.) A Bill of Sale was executed on October 25, 1954. (Ex. F.)

On August 23, 1957, the Internal Revenue Service advised the taxpayer's attorney, who is presently appearing on behalf of the taxpayer, that it had information at that time to the effect that the corporation known as Emerson Institute, which was held to be exempt from tax in June, 1945, was dissolved on September 28, 1946, and that the activities and operations of that corporation was taken over by a partnership created on September 28, 1946. The letter also stated that notification of the dissolution of the corporation was not furnished the Service as required by the exemption ruling; and that the dissolution of the corporation on September 28, 1946, automatically terminated the previous ruling of exemption to the Emerson Institute. (Ex. I.)

By a letter dated April 28, 1959, addressed to "John J. Humphrey, trading as Emerson Institute", the Internal Revenue Service demanded payment of FICA taxes accrued during the first quarter of 1956. In a similar letter dated July 21, 1959, the Internal Revenue Service demanded payment of second quarter (1956) FICA taxes. (JA 10.) It was stipulated in the court below (JA 10) that these taxes were paid by the plaintiff (appellant) and that the plaintiff filed

a claim for refund therefor on March 2, 1961 which it should be noted was prior to the decree referred to in the next paragraph canceling the Certificate of Dissolution and the Agreement of Partnership.

In May, 1960, John J. Humphrey and the taxpayer filed suit in the United States District Court for the District of Columbia against Myra McCathran Myers and John B. Duncan (Recorder of Deeds), seeking to have the Certificate of Dissolution and Agreement of Partnership canceled. (JA 13, Ex. J.) On August 17, 1961, when the District Court entered its decree canceling the Certificate of Dissolution and the Agreement of Partnership, it nevertheless sustained the validity of the sale of the deceased partner's interest to Humphrey. (JA 24-25.)

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*.

SUMMARY OF ARGUMENT

Under the relevant taxing statutes in this case the taxpayer's claim for exemption during the year 1956 depends upon whether it meets the requirements of Section 501(c)(3) of the Internal Revenue Code of 1954 and this in turn depends upon whether it was operated as a corporation in that year. The two remaining trustees of the corporation, which obtained a ruling of exemption from the Internal Revenue Service in 1945, filed with the Recorder of Deeds in 1946 and 1947, respectively, a Certificate of Dissolu-

tion and an Agreement of Partnership. After one of the partners died in 1953, the surviving partner purchased his interest from his estate. When the Internal Revenue Service discovered the recording of the Certificate of Dissolution of the corporation and the Agreement of Partnership it revoked the exemption, and in 1959 asserted a deficiency in FICA taxes for the first and second quarters of 1956 against "John J. Humphrey, trading as Emerson Institute". Thereafter, in 1961, or approximately fourteen years after the Certificate of Dissolution and Agreement of Partnership had been recorded with the Recorder of Deeds, the surviving partner obtained from the District Court a decree of cancellation of the Certificate of Dissolution and the Agreement of Partnership. This decree was not made expressly retroactive and, furthermore, recognized the validity and current effectiveness of the sale of the deceased partner's interest to the surviving partner. Accordingly, the corporation was not in existence for federal tax purposes from 1946 until 1961, and the partnership or sole proprietor could not qualify for exemption under Section 501(c)(3). Assuming *arguendo* that the decree was made retroactive, the authorities clearly show that it is not controlling or binding on the Government for federal tax purposes. In either event the District Court properly granted the Government's motion for summary judgment.

ARGUMENT**The District Court Properly Granted the Government's,
Motion for Summary Judgment****A. Introductory**

Section 3101 of the Internal Revenue Code of 1954, Appendix, *infra*, imposes a tax of 2 percent on the wages of an employee received by him with respect to his employment. Section 3102(a), Appendix, *infra*, provides that the tax imposed by Section 3101 shall be collected by the employer by deducting the amount of the tax from the wages as and when paid. Section 3102(b) provides that every employer required so to deduct the tax shall be liable for the payment of such tax. Section 3111, Appendix, *infra*, provides that a tax of 2 percent shall also be imposed upon the employer. The over-all effect of these provisions is that an employer is required to pay an amount equivalent to 4 percent of the wages of his employees for employment as defined in the statute.

For the purposes of Sections 3101 and 3111 employment is defined in Section 3121(b). Certain exclusions from coverage are provided therein. The only exclusion pertinent here is subsection 10(A) where service is performed in the employ of an organization exempt from tax under Section 501(a), Appendix, *infra*.^{*} Subsection (a) of Section 501 refers in turn to subsection (c) of that section, which is limited to

^{*} Even in the case of an educational institution exempt under Section 501(a) and (c), it may waive the exemption by filing a certificate. No such certificate appears to have been filed in this case.

corporations, foundations, etc., and does not apply to partnerships or individuals. Accordingly, if the corporation, Emerson Institute, continued in existence uninterruptedly, from 1945 through 1961, it is exempt from the taxes imposed by Sections 3101 and 3111; but when the Certificate of Dissolution and Agreement of Partnership filed with the Recorder of Deeds in 1946 and 1947, respectively, are given effect, then the corporation was succeeded by a partnership from 1946 until 1953 when one of the partners died and then by a sole proprietor, John J. Humphrey, trading as Emerson Institute from 1954 until 1961, and the FICA taxes herein controversy were properly collected by the Internal Revenue Service.

B. The 1961 decree of the District Court did not in terms retroactively cancel the Certificate of Dissolution and Agreement of Partnership

The decree of August 17, 1961, of the United States District Court for the District of Columbia, entered approximately fourteen years after the Certificate of Dissolution of the Emerson Institute and the Agreement of Partnership were recorded in the office of the Recorder of Deeds of the District of Columbia, reads in part as follows (JA 24-25):

Now, therefore, it is ORDERED, ADJUDGED AND DECREED, that

1. The writing dated September 28, 1946 purporting to be a Certificate of Dissolution of Emerson Institute, *is hereby cancelled*; and the defendant Peter Ridley is hereby directed to record such cancellation by appropriate inscription on

the copy of such writing, recorded October 1, 1946 in the Office of the Recorder of Deeds for the District of Columbia, in Incorporation Liber No. 64, Folio 457.

2. The writing dated September 28, 1946 purporting to be an Agreement of Partnership between John J. Humphrey and Fred P. Myers, is *hereby cancelled*; and the defendant Peter Ridley is hereby directed to record such cancellation by appropriate inscription on the copy of such writing, recorded February 12, 1947 in the Office of the Recorder of Deeds for the District of Columbia, as Instrument No. 6840 in Liber No. 8423, Folio 431. (Emphasis supplied.)

There is no language in the portion of the decree quoted above which expressly provides that the cancellation of the Certificate of Dissolution and of the Agreement of Partnership is retroactive to September 28, 1946 but, on the contrary, the decree speaks in terms current to August 17, 1961. Furthermore, the decree provides that the validity of the transaction referred to in paragraph 19 of the findings of fact in that case or of the documents referred to therein cannot now be questioned. (JA 25.)

Paragraph 19 provides as follows (JA 22-23):

19. On April 15, 1954, the individual plaintiff and the defendant Myra McCathran Myers, as executrix of the estate of Fred P. Myers, in the belief that there existed a partnership between Fred P. Myers and the individual plaintiff executed an Agreement of Sale by the estate of the decedent's interest in said partnership to the individual plaintiff, and in connection with said transaction there was also executed a Mutual Re-

lease and Indemnity Agreement and a Bill of Sale, all of these latter documents under date of October 25, 1954. The validity of these documents is not questioned, and they are found by the Court to be in full force and effect.

If the sale of the deceased partner's interest to the surviving partner is valid, as the decree provides, there can be no question that the partnership was in existence from 1946 until 1953 and the sole proprietorship from 1953 until the date of the decree in 1961. Since Section 501(a)(3) of the 1954 Code does not apply to partnerships or individuals it is clear that Emerson Institute being operated as a partnership or sole proprietorship during the year 1956 did not qualify for exemption thereunder, and accordingly, the District Court properly granted the Government's motion for summary judgment.

C. *Assuming arguendo that the 1961 decree retroactively canceled the Certificate of Dissolution with respect to the parties to that litigation, it was not binding on the Government for federal income tax purposes*

Assuming *arguendo* that the 1961 decree of the District Court retroactively canceled the Certificate of Dissolution and the Agreement of Partnership with respect to the parties to that litigation, there are a number of decisions in analogous cases which hold that a *nunc pro tunc* decree in proceedings to which the Internal Revenue Service is not a party is not binding for federal income tax purposes. In *M. T. Straight's Trust v. Commissioner*, 245 F. 2d 327 (C.A. 8th, 1957), the retroactive effect of a *nunc pro*

tunc decree on the reformation of three separate trust instruments was held not to be binding on the Commissioner in collection of the national revenue. In affirming the Tax Court, the Court of Appeals stated (p. 329):

The language of the decree "*nunc pro tunc*" is definite. The broad rule as to the effect of a reformation decree is that it relates back to the date of the instrument reformed and is binding upon all except bona fide purchasers without notice "and those standing in similar relations" in short, covering those who have acquired some legal rights which would be destroyed or injured by subsequent reformation *nunc pro tunc*. It is clear that the main object and effect intended by the taxpayer in bringing and prosecuting the Iowa case was to lessen the national income tax for the years involved. The annual loss of income would be the difference between the tax calculated upon the entire income as a taxable unit and the tax on the same amount of income treated as derived from three taxable units, each having one-third of the total income. The situation which determined the application of the income tax to these two years had occurred and become fixed before this reformation proceeding was filed. We believe it cannot be altered by a *nunc pro tunc* decree of a state court. The national revenue is not subject to such control.

In the present case from September 28, 1946, until the 1961 decree Emerson Institute was operated as a partnership or as a sole proprietorship, the surviving partner having bought out a deceased partner's in-

terest when the latter died in 1953. The liability for FICA taxes for the first two quarters of 1956, here involved, was fixed against the sole proprietorship prior to the filing of the suit in the District Court for the cancellation of the Certificate of Dissolution and the Agreement of Partnership which had been executed and recorded approximately fourteen years before. Under such circumstances the Straight case holds that the national revenue is not subject to the control of a local court in a proceeding, to which the Internal Revenue Service is not a party, by the use of a *nunc pro tunc* decree, particularly where, *as here*, the decree has no purpose except to extinguish a tax liability retroactively.

In *Sinopoulo v. Jones*, 154 F. 2d 648 (C.A. 10th, 1946), a state court had decreed in a reformation proceeding that a trust had been irrevocable from the date of its execution. If irrevocable, the trust income was not taxable to the settlor; if revocable, however, such income was so taxable. The District Court held that this did not affect the intervening tax status and, in affirming this, the Court of Appeals stated (p. 650):

The liability of appellant for the income tax chargeable to the income of the trusts for the years in question must be determined from the provisions of the trusts prior to their reformation by the state court. While the judgment of the state court made the reformation of the trusts retroactive and effective as of the date of the execution, this could not affect the rights of the government under its tax laws. It is a general rule that as between parties to an instru-

ment a reformation relates back to the date of the instrument, but that as to third parties who have acquired rights under the instrument, the reformation is effective only from the date thereof.

And in *Daine v. Commissioner*, 168 F. 2d 449 (C.A. 2d, 1948), the court stated in refusing to apply the retroactive effect of a *nunc pro tunc* decree (p. 451):

But even if the petitioner's analysis is correct to the point that under New York law the *nunc pro tunc* order is completely effective as finally written, that will not aid him here. Although such a decision of the state court may bind the parties in the settlement of their legal rights between themselves, yet the determination of tax consequences is not to be so resolved. The decision of a state court might well turn on elements of estoppel, laches, acceptance of benefits, rights of third parties, and other incidents of a decisive nature as to them, but in no proper sense to be held prejudicial to the federal revenue. Hence it is clear that the retroactive judgments of state courts do not determine the rights of the Federal Government under its tax laws. * * *

See also *Piel v. Commissioner*, 340 F. 2d 887, 891 (C.A. 2d).

None of the cases cited by the taxpayer holds that a *nunc pro tunc* decree in a proceeding to which the Internal Revenue Service is not a party is binding on the Federal Government for tax purposes.

The District Court properly granted the Government's motion for summary judgment because (1)

the 1961 decree was not expressly made retroactive to 1946 and (2) even if the decree had been retroactive to 1946 it was not binding for federal tax purposes.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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DECEMBER, 1965.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this brief has been served upon Byron N. Scott, Esq., attorney for appellant, 1010 Vermont Avenue, N.W., Washington, D.C., 20005, by mail on this 10th day of December, 1965.

RICHARD M. ROBERTS
Acting Assistant Attorney General

APPENDIX

Internal Revenue Code of 1954:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under sections 502, 503, or 504.

* * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * * *

(26 U.S.C. 1958 ed., Sec. 501.)

SEC. 3101. RATE OF TAX.

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

- (1) with respect to wages received during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * *

(26 U.S.C. 1958 ed., Sec. 3101.)

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(26 U.S.C. 1958 ed., Sec. 3102.)

SEC. 3111. RATE OF TAX.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with re-

spect to employment (as defined in section 3121 (b))—

- (1) with respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * *

(26 U.S.C. 1958 ed., Sec. 3111.)

SEC. 3121. DEFINITIONS.

* * * *

(b) [as amended by Sec. 205(b), Social Security Amendments of 1954, c. 1206, 68 Stat. 1052] *Employment*.—For purposes of this chapter, the term “employment” means any service performed after 1936 and prior to 1955 which was employment for purposes of subchapter A of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, * * * except that, in the case of service performed after 1954, such term shall not include—

* * * *

- (10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than \$50;

(B) service performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university;

* * * *

(26 U.S.C. 1958 ed., Sec. 3121.)